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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 42

RALPH GINZBURG, DOCUMENTARY BOOKS, INC., EROS MAGAZINE, INC., LIAISON NEWS LETTER, INC.,
Petitioners,

v.

UNITED STATES OF AMERICA, *Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals (R. 385) is reported at 338 F. 2d 12 (3 Cir. 1964). The opinion of the district court denying petitioners' motion in arrest of judgment or for new trial (R. 354) is reported at 224 F. Supp. 129 (E.D. Pa. 1963).

JURISDICTION

The judgments of the court below were entered on November 6, 1964 (R. 394-397). A timely petition for writ of certiorari was filed on January 4, 1965, and was granted on April 5, 1965 (R. 400). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. (a) Does the federal obscenity statute, 18 U.S.C. § 1461, make criminal the mailing of material other than that which is utterly without redeeming social importance, patently offensive and makes its predominant appeal to prurient interest?

   (b) Does material other than "hard-core pornography" come within the proscriptions of 18 U.S.C. § 1461?

   (c) If so, does the federal obscenity statute violate the First Amendment's guarantees of freedom of speech and press?

   (d) Is the federal obscenity statute unconstitutionally vague and uncertain?

2. (a) Does a work have the requisite prurient interest appeal merely because it is erotically stimulating?

   (b) When no portion of a work is erotically stimulating to the average person, can it be deemed to have the requisite prurient interest appeal?

3. Are each of the works in question "obscene" within the meaning of 18 U.S.C. § 1461?

4. In determining whether material is obscene, may the the trial court receive and consider testimony of the effect of such material on adolescents?

5. Petitioners all stipulated to knowing the content of the material each was charged with mailing. Notwithstanding such stipulation, the Government was permitted to introduce evidence of one petitioner's alleged intent to appeal to prurient interest for a profit. The trial court then erroneously attributed this evidence to all petitioners and, relying upon it, convicted all petitioners. May the appellate court affirm the convictions on the theory that, since petitioners had stipulated to scienter, they had not been prejudiced by the erroneous transfer of evidence of a special intent to appeal to prurient interest for a profit?

6. (a) When special findings of fact under Rule 23(c) of the Federal Rules of Criminal Procedure are requested, may the trial court pronounce a general finding of "guilty on all counts", direct the prosecutor to prepare and submit special findings of fact, receive the prosecutor's proposed findings of fact *ex parte,* and enter findings fifty-four days after the initial determination of guilt?

(b) Where, in making findings of fact under Rule 23(c) of the Federal Rules of Criminal Procedure, the trial court has failed to find essential elements of the crime, may the court of appeals supply the missing findings by inferring their existence from other findings and from the trial court's opinion?

CONSTITUTIONAL PROVISIONS, STATUTE AND RULE INVOLVED

The constitutional provisions involved are the First, Fifth, and Sixth Amendments to the Constitution of the United States. The statute involved is 18 U.S.C. § 1461. The rule involved is Rule 23(c) of the Federal Rules of Criminal Procedure. Pertinent portions of the constitutional provisions, statute, and rule are set forth in an appendix hereto.

STATEMENT OF THE CASE

INTRODUCTION

This case involves review of the judgments of the court below affirming petitioners' convictions for mailing obscene material in violation of 18 U.S.C. § 1461. Petitioner Ginzburg was sentenced to five years in prison and fined $28,000.[1] The corporate petitioners were fined a total of $14,000, $500 on each count of the indictment (R. 337-379). The proceedings in the courts below were as follows.

Indictment and Motion To Dismiss

On March 15, 1963, the Grand Jury returned a twenty-eight count indictment charging petitioners with mailing obscene publications and advertisements for those publications in violation of 18 U.S.C. § 1461 (R. 6-13). Ten counts against petitioners Ginzburg and Eros Magazine, Inc. were for mailing and advertis-

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[1] Ginzburg was sentenced to three years imprisonment for mailing "The Housewife's Handbook on Selective Promiscuity," (Counts 11 to 16) (R. 376), and two years for mailing *Eros*, Vol. 1, No. 4 (Counts 17 to 22) (R. 376-377), the sentences to run consecutively for a total of five years imprisonment (R. 377). He was fined $1,000 on each of the mailing and advertising counts (R. 377).

ing *Eros,* Vol. 1, No. 4 (R. 8-9, 10-11); nine counts against petitioners Ginzburg and Documentary Books, Inc. were for mailing and advertising "The Housewife's Handbook on Selective Promiscuity" (R. 6, 9-10); and nine counts against petitioners Ginzburg and Liaison News Letter, Inc. pertained to the mailing and advertising of *Liaison,* Vol. 1, No. 1 (R. 7, 11-13).

Petitioners moved to dismiss the indictment on the grounds that (1) the alleged non-mailable materials were not "obscene" within the meaning of 18 U.S.C. § 1461 and (2) that "all of [the] material [was] protected literary expression under the First Amendment to the Constitution" (R. 13-14). The second ground, insofar as it related to "The Housewife's Handbook," was supported by Ginzburg's affidavit (R. 14-16) to which were appended book reviews (R. 16-19) and sixty-nine letters of commentary from prominent psychiatrists, scientists, physicians, authors and librarians offered to support the Handbook's redeeming social importance (R. 19-147). The Government moved to strike the Ginzburg affidavit and the exhibits annexed thereto (R. 147-148) and the motion was granted immediately following argument (R. 151). The district judge, Body, J., then read "sections" of the Handbook and parts of the other material (See R. 300, 358), concluded that they were "prima facie" obscene, and denied the motion to dismiss the indictment (R. 151). His failure to read the works in their entirety before he denied the motion to dismiss did not become known until trial (R. 300).

Stipulation and Waiver

Before trial the parties stipulated (1) that petitioners mailed the challenged publications knowing

the content thereof, (2) that the advertising materials referred to in the indictment were "not in and of [themselves] alleged to be obscene [but] advertised where and how allegedly non-mailable material could be obtained," and (3) that the indictment charges that each of the alleged non-mailable items "is obscene when considered as a whole" (R. 148-150).

Petitioners waived a jury (R. 2) and the trial commenced before the district judge on June 10, 1963.

The Trial

1. The Government's Case

The Government called as its first witness the Postmaster of Blue Ball, Pennsylvania, who testified, over objection (R. 154-155), that on October 18, 1962, Frank Brady, Associate Publisher of Eros Magazine, Inc., wrote a letter stating that "[a]fter a great deal of deliberation, we have decided that it might be advantageous for our direct mailing to bear the postmark of your city" (Ex. G1; R. 152-155). The Government stated that its purpose in offering this testimony was: "[T]his clearly goes to intent, as to what the purpose of publishing these magazines was" (R. 155). The Postmaster of Intercourse, Pennsylvania, then testified, over objection (R. 157), that in September, 1962, she received a similar letter from Frank Brady on behalf of Eros Magazine, Inc. (Ex. G2; R. 157-158).

The Postmaster of Middlesex, New Jersey, testified that petitioner Eros Magazine, Inc. was issued a permit to mail from Middlesex without affixed postage on August 14, 1962, and made substantial bulk mailings on October 7, 1962, and thereafter (R. 160-161); that petitioner Documentary Books, Inc. was issued a permit and mailed 5,543 copies of "The Housewife's

Handbook on Selective Promiscuity" through his post office (R. 161-162); and that petitioner Liaison News Letter, Inc. made first class mailings through his post office (R. 162). On cross-examination, the witness testified that all of these mailings were handled by the General Mailing Corporation of Middlesex, a mail order house so large that it had a post office substation on its own premises (R. 162-164).

The Government then introduced in evidence the advertisements mentioned in the indictment (Exs. G4-G13; R. 171).

The Government next called John Darr who testified that in the fall of 1962 he applied for a position as a writer with Liaison News Letter, Inc. (R. 173); that he had been interviewed by a Mr. Boroson and then by petitioner Ginzburg (R. 173-174); that he had submitted samples of his prior work and a sample piece for Liaison which he had entitled "How to Run a Successful Orgy" (R. 174-175); and that he was hired to write Liaison, but his employment was terminated following publication of the second issue. (R. 179-183).

The Government introduced in evidence the three allegedly obscene works[2] (Ex. G16-18; R. 178, 184-185) and rested (R. 185). Petitioners made a motion for acquittal which was denied (R. 185-186).

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[2] Neither the Government's nor defendants' exhibits have been reproduced in the Transcript. Ten copies of the material comprising the subject matter of the indictment (Exs. G16-18) and the originals of material offered by defendant for comparative and demonstrative purposes (Exs. D1-D43) have been lodged with the Clerk.

2. Petitioners' Case

Petitioners' first witness was Dr. Charles G. McCormick, a clinical psychologist certified by the States of New York and California, a member of the Editorial Board of the International Journal of Group Psychotherapy, a Fellow of the American Group Psychotherapy Association, a holder of a doctoral degree from Columbia University and for sixteen years a member of the teaching staff of the New York School of Social Work, a Columbia affiliate (R. 186-188).

Dr. McCormick described the effect of pornographic material. (R. 188-196). He explained that pornography produces "both the sense of pleasure and the sense of guilt or shame" in the reader and referred to the elements that go into the creation of this dual effect, *i.e.,* the material must defile or defame sex and sexual expression (R. 188); it must distort both physical and psychological reality (R. 188); and it must be detached from reality to permit maximum indulgence in irresponsible erotic fantasies (R. 192-193). The witness testified that pornographic material is sexually stimulating to most people and that the absence of erotic response to such material would be symptomatic of physical or psychological illness (R. 193). Dr. McCormick described the difference between the average healthy male's response to pornography and his response to an attractive nude woman, testifying that in the latter case a mentally healthy male would be erotically stimulated without accompanying feelings of shame or guilt (R. 193-196).

Dr. McCormick then identified certain books and pamphlets as pornography, and they were introduced in evidence (Exs. D1-D8; R. 196-199, 201). He testified that the average person would be both revolted

and sexually stimulated by reading this material (R. 202). Contrasting the material with "Lady Chatterley's Lover" he said that while both are sexually stimulating, the impact on the mind of the ordinary individual would be radically different. " 'Lady Chatterley's Lover' will not be destroying, tearing, as this material will" (R. 203-204). The distinction, he pointed out, was that pornography, such as "The Autobiography of a Flea", offered as a classic example of "hard-core" material, (Ex. D7; R. 198, 201), engrossed the average reader in a sense of being both soiled and pleased (R. 205-206).

Dr. McCormick next discussed Eros, Liaison, and the Handbook. He testified that there were some passages in Eros that were erotically stimulating (R. 212-214), but even considering those passages separately, they would have "no deteriorating effect on the individual * * *. It is erotically stimulating, but it is not pathological. In other words, there is not a sickness that is being insinuated into the reader" (R. 214). He stated that the dominant effect of Eros would *not* be to create in the average person an itching, morbid or shameful desire with respect to sex (R. 211-212).

The witness testified that the predominant effect of Liaison was *not* to create in the average person an "itching, morbid or shameful desire or longing with respect to sex" (R. 215). In fact, he said, there was nothing in Liaison which could sexually stimulate a normal person at all, and added that only extremely ill persons, termed "paraphiliacs", could be sexually aroused by Liaison's contents (R. 215).

Dr. McCormick testified that the Handbook "would be quite useful as an educational instrument" since it

"gives in real life terms * * * a realistic portrayal of the evolution of sexual awareness and sexual expression * * * [of] an ordinary, everyday person * * * who had to grope her way through just like everybody else has to grope his way through toward some kind of a sexual adjustment and in that sense it is a valuable instrument for a person who is looking for * * * sexual education" (R. 216). In response to the question whether the predominant effect of the Handbook was to create in the average person an "itching, morbid or shameful desire or longing with respect to sex" (R. 209), Dr. McCormick testified: "No, it is not. That is the distinction between pornographic and erotic material. The distinction * * * is that the pornographic material is morbid, does tend to corrode and to turn the person against himself in the process of reading or seeing. In the case of 'The Handbook', this effect will not take place for the ordinary person reading it" (R. 210). The Government did not cross-examine Dr. McCormick (R. 222).

Petitioners' next witness was Professor Horst Janson, Chairman of the Fine Arts Department of New York University, a recipient of two Guggenheim Fellowships, author of many articles and books on the history of art, and Editor-in-Chief of "The Art Bulletin," official journal of the College Arts Association of America (R. 218-219). Professor Janson was unreserved in his praise of the "artistic merits of Eros as a whole" (R. 222). He said that "in terms of the material contained therein, in terms of the graphic layout, and the taste displayed in the presentation of this material, [Eros] is certainly the equal of any magazine being published today" (R. 222). He singled out for special praise and comment the series of photographs

entitled "Black and White in Color" (R. 221). Professor Janson was not cross-examined (R. 222).

Lillian Maxine Serett then took the witness stand (R. 223). She identified herself as the author of the Handbook under the pseudonym Rey Anthony and testified that it was a completely factual autobiography (R. 223, 227). She said that she had written the book because she believed "that a woman's role in sex is widely misunderstood. I hoped that my book written in a language that a lay person can understand could communicate several facts and these would be primarily for women, and one of them would be that the sexual activities and attitudes that the women have are not unusual or unique. They are not different, and another was that various forms of sexual expression are normal and healthy things to do, and also that women do have sexual rights" (R. 226).

She also testified that her own publishing house, Seymour Press, had been advertising and sending the Handbook through the mails since October, 1960, several years prior to the publication and mailing of the Documentary Books edition, and was still continuing to mail it (R. 223-225). She testified further that the Handbook had been and was being ordered, reordered and used by doctors, ministers and at least one medical school, the University of Oregon (R. 225-226). Mrs. Serett was not cross-examined.

Petitioners then called Dwight Macdonald, a distinguished critic and one of the nation's leading commentators on American mass culture (R. 227). Mr. Macdonald is a member of the staff of "The New Yorker", film critic of "Esquire" and the author of many books and articles of literary criticism (R. 228-230). He

testified that in the course of his professional activities he reads about 200 books a year (R. 230).

Mr. Macdonald traced the recent history of the public arts from the novel "Forever Amber" to the novels "Fanny Hill" and "Naked Lunch" (R. 230-231); from the motion picture "The Outlaw" to the motion pictures "Cape Fear" and "Irma La Douce" (R. 234-235); from the Petty and Varga girls of Esquire to the "girlie" magazines of today (R. 233). He testified at length regarding this country's contemporary limits of candor regarding descriptions of sex and nudity (R. 230-235). According to Mr. Macdonald, Eros was considerably within the limits of sexual discussion found in other works freely available in the United States; and neither Liaison nor the Handbook went beyond these limits (R. 235-238). Mr. Macdonald added that the Handbook was less explicit in its discriptions of sexual episodes than "Lady Chatterley's Lover" (R. 236) which was freely sold throughout the United States (R. 232).

Commenting on the literary qualities of Eros, Mr. Macdonald testified that a number of articles in Eros were of considerable literary merit (R. 238-240). The Government did not cross-examine Mr. Macdonald (R. 241).

Mr. Arthur J. Galligan then testified concerning magazines, paperback books, and other literary materials that were freely and openly displayed for sale on major newsstands and bookstores in New York and Philadelphia. Materials purchased at various locations in these cities were introduced into evidence as Exs. D10-D43 (R. 256). There was no cross-examination (R. 256).

Petitioners' next witness was Dr. Peter G. Bennett, a practicing psychiatrist in Philadelphia and a teacher

of psychiatry at the University of Pennsylvania Medical School (R. 256-257). Dr. Bennett delivered a dissertation on the effect of pornography (R. 259-263), stating that it "is not simply an intense stimulation of erotic feelings. It includes this, of course, but erotic stimulation of itself is definitely not harmful or disturbing to the ordinary mature adult, whereas pornography has, always, in addition, a disturbing disintegrative influence even on the mature person which is almost impossible to resist and which abrades the conscience causing morbid feelings of shame and guilt" (R. 259-260). Then followed a detailed analysis of the emotional and environmental factors which play a role in the development of sexual attitudes, and Dr. Bennett's exposition of the psychological mechanism by which pornography achieves its effect (R. 260-263).

Dr. Bennett testified that, in his opinion, the Handbook would not create in the average person the effects he attributed to pornography (R. 264). He stated that while the average person who read Eros might find some "occasional sexual stimulation" (R. 265), the predominant effect of Eros was *not* to create any morbid feelings of shame and guilt (R. 259-260, 264-265), and there was nothing in Liaison which could in any way sexually stimulate the average person (R. 265-266).

The Government cross-examined Dr. Bennett on the meaning he had given the term "hard-core pornography" in a prior writing (R. 266-270), after which the trial court proceeded to conduct its own examination of the witness (R. 270). The trial judge instructed Dr. Bennett to turn to page 207 of the Handbook, inquired whether the author there described an act legally classifiable as sodomy, and asked whether the average person would have a shameful reaction upon

the reading of that page (R. 270-271). Dr. Bennett replied that that would not "cause a shameful reaction in the average reader" (R. 271). The trial court next inquired whether a reading of the book by a boy or girl near 21 years of age "would suggest to them a way of having sexual intercourse in order to have greater sexual satisfaction" and Dr. Bennett answered, "Yes" (R. 271). The court then asked whether fourteen-year-olds reading the book might not be induced to try sodomy as a source of greater sexual satisfaction and Dr. Bennett said, "No, I don't believe they would at that age" (R. 272).

The trial court next asked Dr. Bennett to read page 202 of the Handbook and verify whether that page "suggests a moral code that it is all right to have sexual relations with one not your spouse" (R. 272). Dr. Bennett confirmed that that seemed to be the author's opinion (R. 272-273). Finally, the trial judge asked whether any of his questions had changed Dr. Bennett's opinion concerning the non-obscenity of the Handbook (R. 273) and Dr. Bennett replied that they had not (R. 273).

Defendants next called Reverend George von Hilsheimer, III, a Baptist Minister (R. 273). Reverend von Hilsheimer studied theology and psychology at Washington University in St. Louis, the University of Miami, and the University of Chicago (R. 274-275). His training in psychology includes extensive clinical activities at the Child Guidance Center in Lincoln Park, Missouri, and at New York City's Association for Counseling and Therapy (R. 274). Reverend von Hilsheimer has lectured extensively in universities and theological schools on such subjects as comparative religion, contemporary morals, education, and therapy

(R. 275). He is resident minister and group counselor for the Greater New York Humanist Council and Executive Director of the Fund for Migrant Children (R. 275-277). He was a ministerial counselor to the President's Study Group on National Voluntary Services and a board member of Mobilization for Youth, the first project established by the President's Committee (R. 276). His professional activities involved substantial contacts with the underprivileged in both urban and rural areas (R. 276, 277).

Reverend von Hilsheimer testified that he had first seen the Housewife's Handbook in 1960 when he was given "a copy as a useful tool in therapy" by a colleague at the Association of Counseling in Therapy (R. 289). Since then, he said, he had used the book in pastoral counseling and psychological counseling (R. 289). He testified that the book was particularly valuable in cases of married women who were invested with a sense of shame and guilt about their sexual imageries, values and experiences in that it tends to relieve this sense of shame by giving "the women to whom [he] gives the book at least a sense that their own experiences are not unusual, that their sexual failures are not unusual" (R. 290). He pointed out that the usual marriage manuals are not as helpful as the Handbook because they emphasize the physiognomy of sex and use language "utterly foreign to the majority of people [he works] with" (R. 292). He described the Handbook's special value to both pastoral counselors and psychologists when he testified:

> "Now, it is necessary for the pastoral counselor and for the psychologist if he is going to be responsible to his youth and to his parents to give them a more realistic view of the world in which

> they live and the problems that they are going to face and to fit them with the practical, detailed, immediate, realistic and unshamefully communicated knowledge about the things which are most important to them. This to me is the great value of this book. It says, 'You are not alone. This is the experience of many, many people', and it gives a certain amount of hopefulness to it. It is in my mind theologically quite an innocent book. There is no sense of shame involved in it. There is no sense of prurience involved in it. There is no sense of wallowing in sexuality simply for its own sake but it is a simple, straightforward recount of a fairly unhappy history of a fairly typical woman, and I can say based on my clinical experience and the experience of my colleagues and the literature that this book is not drawn far from the average middle American experience whether involved with one or several partners" (R. 291-292).

On cross-examination the Government asked the witness whether people are assisted by presenting them with "a mass of extramarital engagements" (R. 294) and he answered that he does "not use [the Handbook] as a blueprint for what [people are] supposed to do" but for other purposes (R. 294). He added: "If anything, it teaches that [extramarital] sexuality is not likely to be very enjoyable" (R. 295).

The trial judge then examined the witness (R. 296). First, he inquired whether the witness would have the Handbook "in the library of [his] home if [he had] a fourteen or fifteen, or sixteen-year-old son or daughter" (R. 296). Reverend von Hilsheimer replied that he had it in his home and that it was read by teenage children in his parish who could freely discuss it and what it represents with him in his role as pastoral

counselor. The witness went on to say that the children in his parish (underprivileged members of a racial minority) have "freely available to them hardcore pornography, shamefully discussing lewd, prurient kinds of garbage * * * and their whole understanding of sex is one of exploitation of the girl on the one hand—and the girl has practically no knowledge of what is going on" (R. 296). He described the woeful ignorance of certain underprivileged members of society "who simply do not know the source of pregnancy and their only sexual information is entirely pornographic" (R. 297).

The judge said: "I ask you again, do you give your stamp of approval on the methods of sexual relationships set forth in this book * * *?" (R. 310-311). Stating he was limiting his comments to married couples, the witness answered: "So long as the integrity of one another is respected and so long as it is a natural and easy development of a loving couple, then I don't recall anything in the book which I regard or which is generally regarded as perverse" (R. 311).

Following a brief additional cross-examination by the Government (R. 312-316), Reverend von Hilsheimer was excused and the defense rested (R. 316).

3. The Government's Rebuttal

The Government called three witnesses, stipulating that the testimony of these witnesses should be considered only for rebuttal purposes and not as affirmative evidence on the issue of obscenity (R. 334-335).

The first rebuttal witness was Dr. Nicholas G. Frignito, chief psychiatrist of the County Court of Philadelphia, consultant in neurology to the Veteran's Ad-

ministration Hospital, and associate professor of neurology at Hahnemann Medical College (R. 316-317).

Dr. Frignito testified that, in his opinion, the Handbook had no medical value and was "obscene" (R. 318-319). He stated that he thought the book a "menace" and that it "can lead to a lot of chaotic situations, because my interpretation of the book, it fosters promiscuity. It fosters sexual perversity" (R. 320). Over defense counsel's continuing objection (R. 321, 322, 323), Dr. Frignito was permitted to testify as to the effect of the book upon adolescents, stating that "it certainly is a very dangerous thing" and that "this type of book" encourages delinquency in adolescents because "it would lead to self-abuse, masturbation, and that * * * would lead to other types of sexual activity" (R. 320-324).

On cross-examination, Dr. Frignito admitted he had never heard of Dr. Van de Velde and was unacquainted with that author's classic works on marriage and sex (R. 327).[3] He further stated he had not read "Love Without Fear" by Dr. Eustace Chesser (R. 327). After being apprised of Dr. Chesser's views on the "genital kiss," Dr. Frignito testified that such activity between married people was not perverted and that that was the opinion of most psychologists and marriage counselors (R. 328). But when confronted with his directly contradictory testimony in another case (R. 328-329),[4] he testified that such a practice "is a perversion, no matter who practices it * * *." (R. 329).

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[3] Dr. Theodore H. Van de Velde was the author of *Ideal Marriage, Its Physiology and Technique* (1930); *Sexual Tensions in Marriage* (1931) and more than eighty other principal works.

[4] *Commonwealth* v. *Robin*, Court of Common Pleas No. 2, Philadelphia, Pa., Sept. T. 1961, No. 3177, Jan. 22, 1962.

Dr. Frignito was next asked whether he regarded the physical touching of the private parts "in love-play between a married couple as indecent" and he replied that he did not (R. 329). Confronted again with his contradictory testimony in the other case (R. 330), he recalled that he previously testified that such activity constituted a perversion (R. 330). Dr. Frignito contradicted his prior testimony in the other case three more times (R. 331-332) and concluded his testimony by stating that, despite this Court's holding to the contrary (R. 333), the nudist publication "Sunshine and Health" was obscene "because they portray the completely nude body, men and women" (R. 333).

The next rebuttal witness was Dr. Ann Hankins Ford, chief of psychiatry at the Woman's Hospital and head of the Ann H. Ford Clinic. Dr. Ford, a graduate of the University of Pennsylvania School of Medicine, is a diplomate of the American Board of Neurology and Psychiatry, and has taught at the University of Pennsylvania and the Woman's Medical College. At the time of her testimony she was engaged in private practice (R. 335-336).

Dr. Ford testified that, in her opinion, the Handbook had no medical value in the field of psychiatry or psychology (R. 337) and that it would be disturbing, rather than helpful, in the treatment and counseling of her patients (R. 338). On cross-examination, Dr. Ford acknowledged that her patients were "people who were disturbed in one way or another" (R. 339).

The third and last rebuttal witness was Reverend Adolph E. Kannwischer, a Baptist minister, the holder of the degrees of Master of Sacred Theology from Union Theological Seminary and Doctor of Philosophy

from New York University, and formerly a professor of psychology and director of guidance at Eastern Baptist College and a federal prison chaplain (R. 342). Reverend Kannwischer testified that he had taken several courses in social psychology in the New York Psychiatric Institute and was a member of the Academy of Religion and Mental Health (R. 343). He testified that he would not use the Handbook in pastoral counseling because he would regard it as "detrimental to a person who already is having problems" (R. 344). This concluded the Government's rebuttal testimony.

On summation, the Government conceded that Eros was not "hard-core pornography" but declined to make that concession as to the other material (R. 349). Petitioners motion for a judgment of acquittal was denied (R. 344, 345, 348).

4. The Request for Findings and the General Verdict

After denial of the motion for judgment of acquittal, petitioners' counsel "request[ed] in accordance with Rule 23(c) of the Federal Rules of Criminal Procedure that in the event of a finding of conviction the court make findings of fact especially with regard to each essential element of the crime" (R. 348).

The court announced that its "ruling will be reserved" (R. 348). Thereupon, the Government advised the court that it "has no objections to specific findings of fact as requested by the defendants," but the court replied "[w]e will have to decide that at the end of the argument—because we have this problem of the next case. And I do not believe that we will be able to do it, but I have to determine that later on." (R. 348-349)

The next morning the court announced: "I find the defendants guilty on all counts" (R. 349), and added: "There was a request by counsel for the defendants in regard to special findings of fact, and I will find the facts especially as requested by defendants' counsel. At the earliest possible time they will be found. Meanwhile, I would like to request the government through Mr. Creamer to submit to me proposed findings." (R. 349)

5. Proceedings After the General Verdict

On June 27, 1963, petitioners filed a timely motion in arrest of judgment or, in the alternative, for a new trial, urging, *inter alia,* that the trial court had found defendants guilty without making findings of fact as required by Rule 23(c) of the Federal Rules of Criminal Procedure (R. 350). Prior to answering petitioners' motion, the Government furnished the trial judge with findings of fact which were neither served upon defense counsel nor filed in the docket. On August 6, 1963, fifty-four days after petitioners had been found guilty on all counts, the trial court filed Special Findings of Fact (R. 351-353). The Government then answered petitioners' pending motion in arrest of judgment or for a new trial, and approximately three months later, the trial court filed an opinion denying the motion (R. 354-368).

Explaining why he had asked Government counsel to prepare proposed findings of fact to support the general finding of guilty made the morning after trial concluded, the trial judge said that this was a case requiring "careful consideration," "detailed legal research" and "assistance of counsel" (R. 360), adding: "Defendants were not precluded from submitting find-

ings [in support of their guilt] but apparently chose not to do so" (R. 360).

On December 19, 1963, the trial judge sentenced petitioner Ginzburg to five years imprisonment and a fine of $28,000, and fined the corporate defendants $500 on each count (R. 373-376). A notice of appeal was filed the same day (R. 380).

6. The Appeal

The appeal was argued on June 16, 1964, and decided on November 6, 1964 (R. 385). The court of appeals unanimously affirmed petitioners' convictions (R. 394-397). On November 17, 1964, the court of appeals stayed issuance of its mandate (R. 398), which stay remains in effect pending disposition here.

SUMMARY OF ARGUMENT

I

In *Roth* v. *United States,* 354 U.S. 476 (1957), this Court held that material utterly without redeeming social importance, dealing with sex in a manner predominantly appealing to prurient interest, and substantially exceeding contemporary limits of candor is proscribable obscenity, the mailing of which is made criminal by 18 U.S.C. § 1461.

Under the test promulgated by *Roth* and refined by its progeny, a work that advocates ideas, informs, or is useful to society in any other way, is not obscene. Moreover, as Mr. Justice Brennan's opinion in *Jacobellis* v. *Ohio,* 378 U.S. 184 (1964), makes clear, the social importance of a work may not be weighed against its prurient interest appeal to determine its relative social value for only works "utterly without redeeming social importance" are outside of First

Amendment protection. Were it otherwise, the standard of criminal conduct would be so vague and indefinite that the Fifth and Sixth Amendments, as well as the First, would be violated.

In *Roth,* this Court further limited coverage of the obscenity statute to material which contains sexual descriptions substantially exceeding contemporary limits of candor. This element, called "patent offensiveness", embodies concepts of due process and equal protection. Especially where freedom of speech and of the press are concerned, society cannot condemn that which it generally tolerates. *Smith* v. *California,* 361 U.S. 147, 171 (1959) (Harlan, J., concurring).

In establishing the prurient interest appeal test in *Roth,* this Court made clear that prurient interest and sexual stimulation were not synonymous. Pruriency exists when, viewed as a whole, the work's predominant effect is to invoke shame, guilt or morbidity, and in measuring this effect, certainly insofar as this case is concerned, it is the impact of the challenged material upon the average person that must be determined.

II

Although this Court has not yet said so, and need not say so in order to hold that the works at issue in this case are not obscene, petitioners submit that only that material known as "hard-core pornography" meets all the tests enunciated in *Roth.* This is the material which was described by the Solicitor General in his brief in the *Roth* case, examples of which he lodged with the Clerk of the Court. The coalescence of all elements of proscribable obscenity in "hard-core" material results in a product readily distinguishable from other works dealing with sex providing a comparative method of separating the suppressible

from the protected. *Jacobellis* v. *Ohio,* 378 U.S. 184, 197 (1964) (Stewart, J., concurring). Aside from the objective test that such comparative differentiation affords, petitioners believe that each of the *Roth* concepts may be made the subject of objective evidence, and in the trial court petitioners offered such evidence as to each of the challenged works. However, as will be seen, the trial court disregarded both the evidence and the legal standard, relying instead upon a personal predilection as to what was obscene.

III

A. The uncontradicted testimony and a reading of Eros itself establish that Eros has considerable literary and artistic merit. Although some of its pages contain passages sexually stimulating to the average person, the experts testified that these passages would not induce shame or morbidity. Moreover, *Roth* requires that a work be judged as a whole and, as a whole, Eros is not even sexually stimulating. The testimony and the evidence of books and periodicals openly sold and widely circulated also demonstrate that Eros is well within the limits of candor that society now tolerates in its literature.

B. The Housewife's Handbook of Selective Promiscuity is a true autobiography in which the author details her sexual experience and attitudes. It provides those who are interested in such matters with useful information and valuable insight, and was purchased and used by doctors, ministers, marriage counselors and at least one medical school. The book is also one of serious social comment, the author's advocacy of changes in prevalently held sexual attitudes being expressed throughout. Petitioners also introduced expert testimony to establish that a reading of the

Handbook was useful to women whose normal sexual drives generated feelings of guilt. The Government offered testimony by other experts who thought that the Handbook was not useful for this purpose. The trial court resolved the debate by finding that the Handbook had no such utility. But this value, even if debatable, and the other unchallenged values of the book establish its redeeming social importance.

The Handbook's treatment of its subject is serious, not salacious. The testimony at trial also established that reading the Handbook would not move the average person to morbid and shameful desires with respect to sex. In addition, the expert testimony and a comparison of the Handbook with other works, including sex and marriage manuals, shows that the Handbook does not go substantially beyond contemporary limits of candor.

C. The challenged issue of Liaison, the biweekly newsletter, was primarily devoted to the report of an interview with a noted psychologist and marriage counselor in which he forcefully advocates complete freedom of sexual expression. The trial court's ruling that expression of this view is unprotected by the First Amendment is plainly wrong. *Kingsley International Pictures* v. *Regents,* 360 U.S. 684 (1959). But social value issues aside, the uncontradicted testimony was that Liaison did not go beyond customary limits of candor in its discussions of sex. Moreover, it was established that Liaison did not have prurient interest appeal since nothing in it could sexually stimulate an average person, and the experts testified, without contradiction, that only a mentally ill person would be sexually stimulated by this material.

Because none of the materials are themselves obscene the convictions on the advertising counts must likewise be reversed.

IV

Since none of the challenged publications come within any of the tests for obscenity enunciated in *Roth*, petitioners could not have violated 18 U.S.C. § 1461 by mailing them. However, even if all the publications were obscene, petitioners' convictions would nonetheless have to be reversed.

Although prurient interest appeal and patent offensiveness must conjoin for a work to be held obscene, the trial court failed to find that Eros was patently offensive or that Liaison appealed to prurient interest. These defects in convictions on the Eros and Liaison counts of the indictment may not be remedied by the trial court's subsequent opinion or on appeal. *Stone* v. *United States,* 164 U.S. 380, 383 (1896); *Wilson* v. *United States,* 250 F.2d 312 (9 Cir. 1957).

V

A. The convictions of all petitioners except Eros Magazine must be reversed because the trial judge, over petitioners' objection, permitted the Government to introduce evidence purporting to establish a specific intent to appeal to prurient interest for a profit. This evidence, if admissible at all, was admissible only against Eros Magazine Inc., but the trial court erroneously attributed it to all the defendants and used it to support their convictions. The court of appeals, applying a different theory of the offense than that upon which the Government had tried its case, held that petitioners were not prejudiced by the erroneous transfers of intent. This was error. *Bram* v. *United States,* 168 U.S. 532 (1897); *Cole* v. *Arkansas,* 333 U.S. 196 (1948).

B. The convictions on the Handbook counts must also be reversed because the trial court admitted and relied upon evidence of the Handbook's effect on adolescents. *Volanski* v. *United States,* 246 F.2d 842 (6 Cir. 1957).

C. Finally, the convictions of all petitioners must be reversed because the trial judge, although requested to find the facts specially pursuant to Rule 23(c), Federal Rules of Criminal Proceedure, first found petitioners guilty, then asked the prosecutor to submit findings to support the guilty verdict, received the prosecutor's proposed findings *ex parte,* and adopted those findings fifty-four days after he had determined petitioners to be guilty. If this has occurred in an ordinary criminal case, it would violate every safeguard Rule 23(c) was designed to afford. But reversal is required here, *a fortiori,* for, as the trial court said, this was not an ordinary criminal case. The facts were "not clear and precise", and the "legal ramifications" required "careful consideration" and "detailed legal research".

Under these circumstances the trial court's judgment that defendants were guilty, prior to making the analysis which the requirement of special findings contemplates, was as much a prejudgment as if the court had pronounced petitioners guilty in advance of trial. Subsequent to the decision herein the court below gave comprehensive consideration to the requirements of fact findings. *Roberts* v. *Ross,* 344 F.2d 747 (3 Cir. 1965). No lesser standard can be tolerated in a criminal case, especially one involving "regulation of obscenity" which must "embody the most rigorous procedural safeguards". *Bantam Books, Inc.* v. *Sullivan,* 372 U.S. 58, 66 (1963). When a trial judge convicts, delegates to the prosecutor the responsibility to prepare findings to support the conviction, receives these findings *ex*

parte and off the record, and purports to make findings 54 days after he has adjudged the defendants to be guilty, the judgments of conviction cannot be sustained.

ARGUMENT

I.

THE STANDARD OF OBSCENITY

A. Introduction

In *Roth* v. *United States,* 354 U.S. 476 (1957), this Court enunciated the determinant concepts by which that which may be suppressed was to be judicially separated from that which may not. Obscenity, said the Court, is that which is "utterly without redeeming social importance" (*Id.* at 484); "deals with sex in a manner appealing to prurient interests" (*Id.* at 487); and "goes substantially beyond customary limits of candor in description or representation of such matters" (*Id.* at 487, ftn. 20). This is one of the ever increasing number of cases coming to this Court in which federal and state judges have misunderstood and misapplied these concepts.

Triers of fact still persist in finding that a work has prurient interest appeal because they believe that the average man should not be permitted to read it.[5]

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[5] And are encouraged to do so by federal prosecutors who argue:

"[Prurient interest appeal] does not mean * * * that the actionable material must appeal to the prurient interest of the average person [but rather that] it appeals to [what] the average person considers an unwholesome preoccupation with sex." Brief for Appellee, *United States* v. *West Coast News Co., et al.,* Nos. 15792-15795 (6 Cir. 1965), pp. 32-33.

See also *United States* v. *Klaw,* 2 Cir., Docket No. 28887, Slip op. at 2761, ftn. 11 (July 15, 1965).

"Customary limits of candor" are still measured by the type of material a trial judge would have in *his* library or upon *his* coffee table. The concept "utterly without redeeming importance" is too often employed as a mere label to be attached to that which stands condemned.

Attempts to treat these concepts as objective standards and to offer evidence in traditional form on whether a particular work can by such standards be judged "obscene" are rebuffed by triers of fact whose subjective reaction to the work is too strong to permit enlightenment by objective proof.

In this case the *Roth* standard was misapplied by the prosecutor in the first instance, then by the trial court, and finally by the court of appeals. It is appropriate, therefore, to set out the standard by which petitioners believe the materials which were the subject of this prosecution must be judged under *Roth*. In doing so, we note at the outset that this case involves: (a) criminal punishment—not civil restraint, (b) federal—not state action, and (c) a statute not designed for the protection of a particular group and which makes no distinction between large mailings for a profit and the sending of a single letter by a private person.

B. Redeeming Social Importance

We begin our discussion of obscenity standards with the concept of "redeeming social importance" since, as we understand this Court's *Roth* opinion, only publications "utterly without redeeming social importance" may be constitutionally subjected to the "prurient interest" and "patent offensiveness" tests for obscenity. Petitioners emphasized "redeeming social importance" in the courts below since they believe it

was a concept upon which objective evidence could most readily be offered and understood. The trial court admitted all the evidence which established redeeming social importance but concluded that the works were nonetheless obscene. The court of appeals held the works at issue to be without redeeming social importance and sustained the convictions. We think the courts below misunderstood the meaning of the concept and erroneously disregarded all the evidence of social value, including the evidence afforded by the works themselves.

In *Roth* this Court held that "obscenity" could be excluded from the protection the First Amendment afforded to other writings because it is "utterly without redeeming social importance" (*Id.* at 484). But as Mr. Justice Brennan reiterated in *Jacobellis* v. *Ohio,* 378 U.S. 184, 191 (1964), material dealing with sex in a manner that advocates ideas, or that has literary or scientific or artistic value or any other form of social importance, may not be branded as obscenity and denied the constitutional protection". See also *Kingsley International Pictures* v. *Regents,* 360 U.S 684, 689 (1959).

A lower court judge[6] recently imparted a new and helpful dimension to the term "social importance" when he instructed a jury that a work has this quality:

> "If it has the capacity to broaden man's range of sympathies or consciousness, or to enable him to see, hear or appreciate what he might otherwise have missed, or deepens his emotions, or makes life

[6] Judge Bernard Selber in *People* v. *Getz,* Municipal Court, Los Angeles Judicial District, County of Los Angeles, State of California, No. 207224, December 8, 1964, quoted at II Law in Transition Quarterly 109 (1965).

> seem richer, more interesting, or more comprehensible, or provides insights into man's relationship to the social world in which he lives. A work may have social importance even if it appears worthless to the average person or to most persons."

We turn then to the question of how much value a work must offer not to be outside the sweeping protection of the First Amendment? The answer was given in *Roth* and repeated in *Jacobellis* when Mr. Justice Brennan said:

> "[T]he constitutional status of the material [may not] be made to turn on a 'weighing' of its social importance against its prurient appeal, for a work cannot be proscribed unless it is 'utterly' without social importance" (378 U.S. at 191).

The highest courts of California,[7] New York[8] and Illinois[9] agree.

This First Amendment principle bars suppression of any work of the slightest value, whether the suppression be accomplished by civil order or criminal sanction. But when dealing with a criminal statute, as we are here, there is an additional compelling reason why only material which is *utterly* without social importance can be proscribed. "The standards of certainty in statutes punishing for offenses is higher than in those depending primarily upon civil sanction for enforcement." *Winters* v. *New York,* 333 U.S. 507, 515 (1948).

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[7] *Zeitlin* v. *Arnebergh,* 59 Cal. 2d 901, 31 Cal. Rptr. 800 (1963).

[8] *Larkin* v. *G. P. Putnam's Sons,* 14 N.Y. 2d 399, 200 N.E. 2d 760 (1964).

[9] *People* v. *Bruce,* 31 Ill. 2d 459, 202 N.E. 2d 497 (1964).

Can this statute survive the challenge that its vagueness violates due process if men are "required to guess" whether a work has a *sufficient* quantity of social importance to permit mailing? Can persons of "common intelligence" be charged at their peril to apply a balancing test in order to ascertain whether mailing a book will subject them to criminal conviction? *Winters* v. *New York*, 333 U.S. at 515.

The question whether 18 U.S.C. § 1461 "violate[s] due process, because too vague to support conviction for crime" was posed in *Roth*, and answered:

> "we hold that [this statute], applied according to the proper standard for judging obscenity [does] not * * * fail to give men in acting adequate notice of what is prohibited." (354 U.S. at 492)

But if "redeeming social importance" of challenged material is to be determined by first calculating the product of the quantity and quality of its social value elements and then weighing that product against its prurient interest appeal, it would be difficult to conceive of a more vague and indefinite standard of criminal conduct. Only if the words of *Roth* "utterly without redeeming social importance" mean what they say, can criminal obscenity statutes survive the challenge that they violate the Fifth, Sixth and Fourteenth Amendments. Thus, material found to have some social value may not be suppressed and certainly may not be the basis for criminal conviction of the utterer or disseminator. Only when a work is found to be totally devoid of value can we even begin to subject that work to the other tests which identify actionable obscenity.

The existence or nonexistence of value can in some instances be determined by the court without extrinsic evidence. For example, if it were claimed that a work was protected because it advocated repeal or amendment of laws restrictive of sexual conduct, judges are equipped by professional experience to detect the advocacy. However, when the claimed value is in areas where the triers of fact have no special competence, such as a claim of literary, artistic or scientific value, we think it appropriate and often necessary that opinions be elicited from those who are "learned in the art".

C. Patent Offensiveness

"[T]he *Roth* standard [for obscenity] requires * * * a finding that the material 'goes substantially beyond customary limits of candor in description or representation of [sexual] matters.' " *Jacobellis* v. *Ohio,* 378 U.S. 184, 191 (1964) (opinion of Brennan, J.); *Manual Enterprises* v. *Day,* 370 U.S. 478, 486 (1962) (opinion of Harlan, J.). This concept, referred to as "patent offensiveness," is derived from the words of the statute which "connote something that is portrayed in a manner so offensive as to make it unacceptable under current community mores." *Manual Enterprises* v. *Day,* 370 U.S. at 482.

The requirement that a work go "substantially beyond customary limits of candor" before it can be suppressed as obscene also embodies a constitutional requirement of due process. "The community cannot, where liberty of speech and press are at issue, condemn that which it generally tolerates." *Smith* v. *Cali-*

fornia, 361 U.S. 147, 171 (1959) (Harlan, J., concurring).[10]

In order to determine whether a particular work is "patently offensive" we must begin with ascertainment of the limits of sexual candor that society now tolerates in literature and other forms of expression. The work in question must then be examined to see if it goes *substantially* beyond those limits.[11]

Petitioners believe, and tried their case on the assumption, that the contemporary limit of sexual candor is a question of fact on which evidence can be adduced. Experts on mass culture whose professional experience and activities provide them with information as to what books and magazines are being sold and read are in a much better position to know what society now tolerates than a judge whose personal reading habits may be quite different from those of the crowd. Examples of books and magazines openly displayed and publicly sold are also evidence of what society now tolerates, although it may be most unlikely that a jurist would be inclined to buy and read such publications. Courts can also take judicial notice of books in wide circulation. Petitioners offered evidence under each of these categories.

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[10] Cf. *United States* v. *Klaw,* 2 Cir., Docket No. 28887, Slip op. at 2769-2770 (July 15, 1965) wherein Judge Moore questions whether the defendant, convicted for mailing sado-masochistic books, "might understandably wonder as to the meaning of equal protection of law" on reading such works as "Fanny Hill", "Tropic of Cancer" and "Pleasure Was My Business" in the prison library.

[11] *Roth* v. *United States,* 354 U.S. 476, 487, ftn. 20 (1957); *Grove Press* v. *Christenberry,* 175 F. Supp. 488, 499 (SDNY 1959), aff'd 276 F.2d 433 (2 Cir. 1960); American Law Institute, Model Penal Code, Proposed Official Draft (May 4, 1962 § 251.4(1)).

D. Pruriency

In *Roth,* with the "evident purpose to tighten obscenity standards",[12] this Court stated that henceforth the test would be "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest" (354 U.S. at 489). No longer could the censor consider isolated excerpts of a work. No longer could the work be judged by its impact upon those members of the community thought to be most susceptible to it. These were clear negations.[13] Not so certain was the affirmative meaning to be ascribed to the standard. But this much was clear, "prurient interest appeal" and "erotic stimulation" were not synonymous. An appeal to prurient interest required the evocation of shame, guilt and morbidity. *Id.* at 487, ftn. 20; *Grove Press* v. *Christenberry,* 175 F. Supp. 488, 499 (SDNY 1959), aff'd 276 F. 2d 433 (2 Cir. 1960). Material evoking a healthy sexual response was not proscribed. *Roth* v. *United States,* 354 U.S. at

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[12] *Manual Enterprises* v. *Day,* 370 U.S. 478, 487 (1962).

[13] But not so clear that they were accepted by the courts below. Both courts dealt with bits and pieces of Eros (R. 364-365, 389), despite the Government's stipulation that Eros and the other works were to be considered as a whole, and the trial court determined that all of the works in question were "*prima facie*" obscene after having read only parts of them (R. 358). That court also considered "children of all ages, psychotics, feeble-minded, and other susceptible elements" (R. 368) as members of society upon whom the works' effects were to be judged, and the court of appeals apparently did the same (R. 393). In considering the materials' effect upon each member of society, rather than upon "the average man", courts "retain most of the objectionable rigor of the old Hicklin rule * * *." Lockhart & McClure, *Censorship of Obscenity: The Developing Constitutional Standards,* 45 Minn. L. Rev. 5, 72 (1960). See also *Butler* v. *Michigan,* 352 U.S. 380 (1957).

487; *Flying Eagle Publications* v. *United States*, 273 F. 2d 799, 803 (1 Cir. 1960).

In *Roth* we were also told that prurient interest was to be determined by the materials' "impact" upon the "average person" (354 U.S. at 489, 490). Certainly this is true when material is not aimed at a special audience, and the publications at issue were neither designed for nor directed to adolescents[14] nor to any other specially susceptible group.[15]

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[14] See: Richard H. Kuh, former Assistant District Attorney, New York County, *Obscenity: Prosecution Problems and Legislative Suggestions*, 10 Catholic Lawyer 285, 291-292 (1964):

> "Mailmen, trudging their appointed rounds during the winter of 1961-62, may have been warmed by both the content and volume of a mailing piece they were carrying. Ralph Ginsburg [sic], formerly an editor of *Look* and *Esquire*, and author of the highly successful mail order volume *An Unhurried View of Erotica*, had sent out millions of stimulating mailing pieces, promising choice erotic items in a quarterly, *Eros*, he was about to publish. * * *
>
> "By the time the fourth issue appeared in the winter of 1962-1963, we had formed an impression that the quarterly was becoming progressively more obscene, at least to an extent that it merited presentation to a grand jury to determine whether the jury, as the 'conscience of the community,' found that 'contemporary community standards' had been violated. * * * As best we were able, we tried to put the case to the grand jurors 'down the middle' in order to get the voice of that 'conscience' unpricked by prosecutorial thinking. After hearing witnesses and examining the magazine and its advertising, in the spring of 1963 the grand jury filed 'no bill,' declaring—in effect—that *Eros* was not repugnant to the contemporary community's highly sophisticated standards, and that any advertising of it that happened to fall into the hands of youngsters was unintentional, and inevitably incidental to the publication's massive direct mail campaign."

[15] The fact that more than 5,000,000 advertising circulars were mailed for Eros Magazine (R. 161) would hardly be consistent with an attempt to circularize selected perverts. Cf. *Manual Enterprises* v. *Day*, 370 U.S. at 482; see also *United States* v. *Klaw*, 2 Cir., Doc. No. 28887, decided July 15, 1965.

"Pruriency" then is the "effect" element[16] of proscribable obscenity and is determined by the materials' impact on the average person. Petitioners believe that such determination requires awareness of the state of mind of the average person concerning sexual matters and of the psychological mechanism by which obscenity induces feelings of sexual guilt, shame and morbidity. These are factual matters especially given over to the competence of trained and credentialed psychologists and psychiatrists, such as those who testified in this case. Whether a particular work has the capacity to induce morbid and unhealthy response in the average person is also a question for those who are skilled in analysis of mental stimuli and reactions. Lay speculation and suspicion "about the prurient appeal of material to some * * * person whose psyche is not known" is bound to be uninformed and may even be legally unpermissible. *United States* v. *Klaw*, 2 Cir., Docket No. 28887, Slip op. at 2766 (July 15, 1965).

II.

"HARD-CORE PORNOGRAPHY"—THE ONLY MATERIAL THAT MEETS THE TESTS FOR OBSCENITY

The term "hard-core pornography" identifies a specific class of material which in *Roth* the Solicitor General described as follows:

> "This material is manufactured clandestinely in this country or abroad and smuggled in. There is no desire to portray the material in pseudo-scientific or 'arty' terms. The production is plainly 'hard-core' pornography, of the most explicit variety, devoid of any disguise.
>
> "Some of this pornography consists of erotic objects. There are also large numbers of black and white photographs, individually, in sets, and

[16] *Manual Enterprises* v. *Day*, 370 U.S. at 484.

> in booklet form, of men and women engaged in every conceivable form of normal and abnormal sexual relations and acts. There are small printed pamphlets or books, illustrated with such photographs, which consist of stories in simple explicit words of sexual excesses of every kind, over and over again.[17] No one would suggest that they had the slightest literary merit or were intended to have any. There are also large numbers of 'comic books,' specially drawn for the pornographic trade, which are likewise devoted to explicitly illustrated incidents of sexual activity, normal or perverted. * * * It may safely be said that most, if not all, of this type of booklet contains drawings not only of normal fornication but also of perversions of various kinds." (Brief for the United States at pp. 37-38)

In that case, examples of "hard-core" material were lodged with the Clerk of this Court by the Solicitor General. Other examples were received in evidence in this case (See Exs. D1-D8, R. 196-199, 201). Two experts, a psychiatrist and a psychologist, testified that this type of material has a special effect which distinguishes it from other works which "simply [pro-

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[17] The content of hard-core material of the textual variety is also described in Lockhart & McClure, *Censorship of Obscenity: The Developing Constitutional Standards*, 45 Minn. L. Rev. 5, 63-64 (1960). Such works "are always made up of a succession of increasingly erotic scenes without distracting non-erotic passages. These erotic scenes are commonly scenes of willing, even anxious seduction, of sadistic defloration in mass orgies, of incestuous relations consummated with little or no sense of guilt, of supermissive parent figures who initiate and participate in the sexual activities of their children, of profaning the sacred, of super-sexed males and females, of Negroes and Asiatics as sex symbols, of male and particularly female homosexuality, and of flagellation, all described in taboo words." See also Kronhausen, *Pornography and the Law* 18, 178-254 (pbk. ed.) (1959).

duce] an intense stimulation of erotic feelings * * * not harmful or disturbing to the ordinary mature adult * * *". It has "in addition, a disturbing disintegrative influence even on a mature person which is almost impossible to resist and which abrades the conscience causing morbid feelings of shame and guilt" (R. 202-206, 259-260).[18] Material other than "hard-core pornography" will not evoke a "prurient" response in the average healthy person.

Another distinguishing mark of "hard-core" material is that its lack of value to society is manifest. Other material dealing with sex can make serious claim to some "redeeming social importance" but it is difficult to perceive how such a claim can be made for the examples of "hard-core" material petitioners introduced as comparative evidence in this case. These examples also display a "patent offensiveness" so gross as to be "self-demonstrating".[19] At this particular point in history, where society's toleration of sexual discussion in literature is almost unbounded, it would be difficult to find material that goes *substantially* beyond the limits of that toleration unless that material is "hard-core pornography".

The coalescence of these three elements (a) prurient interest appeal to the average person, (b) total lack of social value and (c) sexual descriptions going substantially beyond the customary limits of candor, results in a product which is immediately recognizable.

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[18] The American Law Institute premised its definition of "prurient interest" on the "psychosexual tension" which arises in the ordinary person in our society "caught between normal sex drives and curiosity, on the one hand, and powerful social and legal prohibitions against overt sexual behavior". Model Penal Code, Tentative Draft No. 6, p. 10 (1957).

[19] *Manual Enterprises* v. *Day*, 370 U.S. at 487.

Jacobellis v. *Ohio,* 378 U.S. 184, 197 (Stewart, J., concurring). Those triers of fact who have seen examples of "hard-core" material and are capable of distinguishing that material from other works dealing with sex are afforded a non-analytical, but nonetheless accurate method of distinguishing that which is "obscene" from that which is not. For only material properly classified as "hard-core" meets the standard of obscenity enunciated by this Court.

III.

THE MATERIALS AT ISSUE ARE NOT OBSCENE

A. Introduction

We now proceed to discuss the materials at issue and to show that none of them is "obscene" under the standard enunciated by this Court. In examining this material "in the light of the record made in the trial court" (*Jacobellis* v. *Ohio,* 378 U.S. 184, 196), we first note that the Government offered no affirmative evidence to sustain its burden of establishing that the works were obscene beyond a reasonable doubt (R. 334) other than the works themselves. The Government's case in chief consisted solely of the introduction of the materials mailed and testimony which it now agrees was irrelevant.

B. Eros

Eros, until discontinuance of publication following the indictment in this case, was issued as a hard-cover quarterly periodical at a regular subscription price of $25.00 a year (Exs. G10-13, R. 170). It is the fourth issue[20] with which we are concerned.

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[20] No action, civil or criminal, state or federal, was ever instituted against the first three issues.

The Government concedes that Eros is not "hard-core pornography" (R. 349).

(1) Redeeming Social Importance

A reading of this issue of Eros shows much of obvious merit. Tastes may differ, but few readers would find nothing of intellectual or emotional appeal. Dwight Macdonald saw merit in the text and illustrations of the articles "Love in the Bible", "Jewel Box Revue", "Letter from Allen Ginsberg", "New Twists on Three Great Trysts", "The Natural Superiority of Women as Eroticists", "Black and White in Color" and "Lysistrata". He classified "Was Shakespeare a Homosexual?" as "mediocre" and "Bawdy Limericks" as "vulgar" but not "obscene or pornographic" (R. 239-240).

Professor Janson testified that "in terms of the material contained therein, in terms of the graphic layout, and the taste displayed in the presentation of this material [Eros] is certainly the equal of any magazine being published today" (R. 222). He gave a detailed exposition of the identity of numerous works of art found in the issue (R. 219-221), and was unreserved in his praise of the photographic essay "Black and White in Color". He referred to the photographer's "extraordinary sense of form and composition" and "awareness of compositional devices and patterns that have a long and well-established history in western art" (R. 221). He pointed out how the "contrast in the color of the two bodies * * * has presented [the photographer] with certain opportunities that he would not have had with two models of the same color, and he has taken rather extraordinary and very delicate advantage of these contrasts" (R. 222). In summary,

he stated, "I cannot imagine the theme of [interracial love] being treated in a more lyrical and delicate manner than it has been done here" (R. 221).

The trial judge disagreed as to the overall merit of Eros. He condemned "Black and White in Color" as having "all the requisite elements of obscenity" (R. 364). He similarly condemned other articles, including some singled out by Mr. Macdonald for special praise. He acknowledged that Eros had "items of possible merit" (R. 363), but never indicated which they were. The court below found only "bits of non-statutory material"[21] (R. 389, 390) and nothing of value.

These conclusions are insupportable. Eros, as a whole, cannot be deemed to be "utterly without redeeming social importance". The uncontradicted testimony of Mr. Macdonald and Professor Janson, and the fact that such testimony is consistent with any reasonable appraisal of *Eros* itself, precludes a finding that "Eros has not the slightest redeeming social, artistic or literary importance or value taken as a whole" (R. 353).[22] "The trier of facts under proper circumstances may reject expert testimony and reach a conclusion based upon its own knowledge, experience and judgment. However, it must fairly appear from the record that the fact finder had knowledge and experience relative to the subject matter." *Cullers* v.

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[21] The trial judge named those articles which seemed to him "innocuous, only slightly erotic and possibly not obscene in and of themselves" (R. 363-364). They totalled more than two-thirds of the issue.

[22] We believe the same conclusion would be reached if Eros were to be considered on an article by article basis, but since the Government stipulated that the indictment charges that Eros is obscene "when considered as a whole" (R. 149), we do not argue this point.

CIR, 237 F. 2d 611, 616 (8 Cir. 1956); *Pittsburgh Hotels Co.* v. *CIR,* 43 F. 2d 345, 347 (3 Cir. 1930).

It does not appear that the trial court had any special knowledge on matters literary or artistic. What the trial judge did then was to "arbitrarily disregard all the expert testimony in the record and rely upon his unsubstantiated personal beliefs instead of upon evidence". *Alvary* v. *United States,* 302 F. 2d 790, 794 (2 Cir. 1962). See also, *Cullers* v. *CIR,* 237 F. 2d 611, 616 (8 Cir. 1956); *Gordon* v. *CIR,* 268 F. 2d 105, 107 (3 Cir. 1959); *Yip Mie Jork* v. *Dulles,* 237 F. 2d 383, 384 (9 Cir. 1956); *Stevens* v. *Continental Can Co.,* 308 F. 2d 100, 104 (6 Cir. 1962).

(2) Pruriency

Drs. McCormick and Bennett both testified that a reading of Eros would not cause the average person to have morbid or shameful sexual desires (R. 211-212, 264-265). There are passages in Eros which are erotically stimulating (R. 212-214, 265), but erotic stimulation is not the equivalent of "pruriency", and when considered as a whole Eros is not even erotically simulating. Moreover, as Dr. McCormick testified, those passages of Eros which are sexually stimulating, even if considered as isolated excerpts, do not evoke a morbid and unhealthy sexual response in the average person (R. 214).

The trial judge nevertheless found that "Eros appeals predominantly, taken as a whole, to prurient interest of the average adult reader in a shameful and morbid manner" (R. 353), and the court of appeals said that Eros' "basic material predominantly appeals to prurient interest" (R. 389).

The Government offered no testimony to establish Eros had "prurient interest appeal", and all the evi-

dence is otherwise. The trial judge did not claim any special competence in these matters, nor did he find that Drs. McCormick and Bennett had lied on the witness stand. One is left to conclude that his finding that Eros "appeals predominantly, taken as a whole, to prurient interest of the average adult reader" was predicated upon a mistaken notion of the meaning of the term or a highly personalized view of what would evoke the prurient interest of the average person.

(3) Patent Offensiveness

Dwight Macdonald, a literary critic and expert on mass culture, testified at length concerning the rapid changes over recent years in society's toleration of sexual depiction in books, magazines and motion pictures (R. 230-235). He stated without contradiction that Eros did not go beyond the customary limits of candor that society now tolerates in its literature and that in fact it falls considerably within those limits (R. 237-238). Arthur J. Galligan testified as to books and periodicals which are found prominently displayed for public sale on major newsstands and in bookstores in New York and in Philadelphia (R. 242-253). Items purchased at these newsstands and bookstores were offered in evidence (Exs. D10-43, R. 256). The trial court admitted all the evidence bearing upon community standards, including Mr. Macdonald's testimony that Eros was well within those standards.

In the Special Findings of Fact, entered 54 days after finding Ginzburg and Eros Magazine guilty, the trial court failed to make a finding that Eros was patently offensive or that it substantially exceeded customary limits of candor in describing or represent-

ing nudity or sex (R. 353).[23] Some three and a half months later in an opinion denying the motion for a new trial, the trial judge attempted to fill the gap.[24] First he brushed aside defendants' exhibits with the *ipse dixit:* "Doubtless but a sliver of the community reads such things and there is no doubt the community as a whole does not necessarily tolerate them" (R. 367). Then characterizing himself "as a fact finder * * * who is aware of all types of material sold, tolerated and not tolerated by the community as a whole" he purported to find that Eros and the other material at issue "unequivocally" exceed "the standard" (R. 367). The court did not identify the type of material which he considered as establishing that standard, and his conclusion is in direct contradiction with the expert testimony of Mr. Macdonald. We believe that comparison of Eros with books such as "Tropic of Cancer", "Lady Chatterley's Lover", "Naked Lunch", and Frank Harris' "My Life and Loves", and periodicals such as those in evidence in this case,[25] inexorably leads to the conclusion reached by Mr. Macdonald.

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[23] See Point IV, pp. 57-58, *infra.*

[24] But an opinion, especially one issued long after findings were made, cannot be used to supply an essential but missing finding. *Stone* v. *United States,* 164 U.S. 380, 383 (1896); *United States* v. *Esnault-Pelterie,* 299 U.S. 201, 206 (1936); *Crocker* v. *United States,* 240 U.S. 74, 78 (1916).

[25] The periodicals in evidence are: Rogue (Ex. D11; R. 256); Nymph (Ex. D18; R. 256); Tic-Toc (Ex. D19; R. 256); Pastime (Ex. D20; R. 256); Adam (Ex. D21; R. 256); Satan's Scrap Book (Ex. D22; R. 256); Kiss (Ex. D23; R. 256); Stark (Ex. D24; R. 256); French Frills (Ex. D25; R. 256); Hip and Toe (Ex. D26; R. 256); Vue (Ex. D27; R. 256); Tip-Top (Ex. D31; R. 256); Snap (Ex. D32; R. 256); Twilight (Ex. D33; R. 256); Zoftick (Ex. D34; R. 256); Ruby (Ex. D35; R. 256); Torch (Ex. D36; R. 256); Nude World (Ex. D37; R. 256); Gymnos (Ex. D38; R. 256); Escapade (Ex. D40; R. 256); Cavalcade (D41; R. 256); Scamp (D42; R. 256).

(4) Summary

Eros has redeeming social importance, does not predominantly appeal to prurient interest, and does not go substantially beyond the limits of candor that society now tolerates in literature dealing with sexual matters. It is not "hard-core pornography" and the Government concedes that it is not. Eros is not "obscene".

C. The Housewife's Handbook

(1) Redeeming Social Importance

The Handbook is not a work of fiction. It is a true, frank and comprehensive autobiography of a woman's thoughts, feelings and reactions (R. 227).

The Handbook is divided into two parts entitled "Experiences" and "Miscellaneous Concepts". In "Experiences", Mrs. Serett discusses her sexual attitudes, problems and occasional satisfactions against the background of family prudery (*e.g.,* Ex. G17, pp. 23, 114), three marriages (at pp. 65-68, 87-145, 145-206), and the birth and rearing of children (at pp. 90, 101, 116-117, 126-127, 203-204). In "Miscellaneous Concepts", Mrs. Serett, building from the foundation of "Experiences", summarizes and generalizes that which her experiences have taught her (at pp. 216-240).

The Handbook is a document of social importance for three separate reasons—it provides valuable information, it contains protected social commentary, and there are those who think it is useful to persons, particularly women, whose normal sexual drives beset them with feelings of guilt.

(a) *Informational Value*

In a preface to the Handbook, Dr. Albert Ellis, a noted authority in the field of human sexual behavior,[26] states that "the Handbook makes a distinctly valuable contribution to sexual knowledge" (at p. 8). Lamenting the near total lack of "straight-forward accounts [by women] of their sexual experiences and sensations", Dr. Ellis commends the book as one which "should be in the library of every serious researcher and professional worker in the field of sex, love, marriage, and family relations" (at pp. 8-9). Mrs. Serett testified that the book had in fact been ordered and reordered by doctors, ministers and at least one medical school[27] (R. 225-226).

Dr. McCormick testified that the Handbook gives "a realistic picture of a woman's attitude and activi-

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[26] Dr. Albert Ellis is a Fellow of the American Psychological Association and has been President of its Division of Consulting Psychology and a member of its Council of Representatives. He has been Vice-President of the American Academy of Psychotherapists; Chairman of the Marriage Counseling Section of the National Council on Family Relations, and a member of the Executive Committee of the American Association of Marriage Counselors. He is a consultant in Clinical Psychology to the Veterans' Administration, was formerly Chief Psychologist of the New Jersey State Diagnostic Center, and later Chief Psychologist of the New Jersey Department of Institutions and Agencies. He has served as Associate Editor of the *Journal of Marriage and the Family*, the *International Journal of Sexology*, *Advances in Sex Research*, the *Journal of Sex Research and Rational Living*, and has published over two hundred papers in psychological, psychiatric, and sociological journals, periodicals and anthologies. He has authored or edited twenty-four books and monographs on the subject of sex and sexual practices.

[27] On sentencing, the Government conceded that many physicians had purchased the Handbook (R. 370).

ties with respect to sex" (R. 210) and "would be quite useful as an educational instrument" (R. 216).[28] Dr. Bennett testified that people can find out about sex "from such books as the 'Housewife's Handbook'" (R. 261).

The validity of these observations, which stand uncontradicted on the record, are self-demonstrating. A work, such as the Handbook, that provides truthful, informative and useful data concerning the sex side of life is of social value and protected by the First Amendment.

(b) *Social Comment*

Mrs. Serett, as she testified she set out to do (R. 226), advocates the reshaping of society's concept of

[28] The book's informational importance is further supported in book reviews by Dr. William J. Bryan, Jr. and Dr. Robert M. Frumkin (Exhibits Annexed to Motion to Dismiss Indictment, R. 16-19); and letters of comment by such persons as Dr. Theodor Reik (*Id.* R. 19); Author Lucy Freeman (*Id.* R. 20); Nobel Prize Winner Hermann J. Muller, Ph.D., D.Sc. (*Id.* R. 20-22); William L. Purcell (*Id.* R. 32-33); Eugene B. Nadler, Ph.D. (*Id.* R. 42); Samuel Baron, Ph.D. (*Id.* R. 54-55); Dr. W. A. Black (*Id.* R. 61-62); S. J. Fields, Ph.D. (*Id.* R. 73); Maxwell Geismar (*Id.* R. 80-81); Dr. George J. Wittenstein (*Id.* R. 86); Phyllis C. and Eberhard W. Kronhausen, Ed.D. (*Id.* R. 87-89); Dr. Edward C. Falk (*Id.* R. 94); William M. Smith, Ph.D. (*Id.* R. 94-96); Rev. Quentin L. Hand, Ph.D. (*Id.* R. 109-110); Henry Paar, Ph.D. (*Id.* R. 141-142); Carlos A. Allen, Jr., Ph.D. (*Id.* R. 143-144). These reviews and letters were stricken when offered in support of the motion to dismiss the indictment, but they should be accorded some weight as written, extra-judicial commentary in support of the Handbook's claim to social importance. See *Jacobellis* v. *Ohio*, 378 U.S. 184, 196 (1964); *Besig* v. *United States*, 208 F. 2d 142, 147 (9 Cir. 1953); *Grove Press* v. *Christenberry*, 175 F. Supp. 488, 497, 502 (SDNY 1959), and see also affirming opinion, 276 F. 2d 433, 437, ftn. 6 (2 Cir. 1960); *United States* v. *One Book Entitled Ulysses*, 5 F. Supp. 182 (SDNY 1933), aff'd 72 F. 2d 705 (2 Cir. 1934).

sexual normalcy and urges that women must be given at least equal consideration in the reshaped concept. In "Experiences" she refers to sexual encounters with men who were interested solely in their own sexual gratification (at pp. 75, 76-77, 86, 148-149) and shows how greater pleasure is achieved by both parties when the male is concerned with the female's satisfaction (at pp. 44-46, 50-51, 77-78, 120-121).

In "Experiences" she challenges the view that only penile-vaginal intercourse is "acceptable" and shows that other forms of sexual activity, even those held to be criminal, are enjoyable and normal (at pp. 46, 52-53, 112-114, 119-125, 140-142). In "Miscellaneous Concepts" she sums up these experiences and decries the hypocrisy of laws that forbid sexual activity commonly practiced (at pp. 225-227, 230-238).

In "Experiences" she pierces the humbug of typical parental response to children's sexual questions and shows the advantage of correct information communicated in an unshameful way (at pp. 19, 26-27, 32-34, 90, 114-115, 126-127, 154); in "Miscellaneous Concepts" she drives the lesson home (at pp. 216-221).

In "Experiences" she tells the story of her two abortions and of a friend who died from a home-brewed abortifacient (at pp. 47-50, 62-65, 156-157). In "Miscellaneous Concepts" she urges repeal or modification of our abortion laws (at 227-230).

Mrs. Serett has these and many other things to communicate to those who would listen.

(c) *Utility*

Dr. Bennett testified that persons with anxieties about sex "may even be turned to a fuller enjoyment

of life, as I think might happen to many as a result of reading Mrs. [Serett's] book" (R. 262). Reverend von Hilsheimer testified that the Handbook had been recommended by a colleague as a "useful tool in therapy" and that he had used it in pastoral and psychological counseling (R. 289). He found that the book tended to relieve the sense of shame that most women have about their sexual thoughts and activities by demonstrating "that their own experiences are not unusual, that their sexual failures are not unusual" (R. 290). He found the book to be more helpful than conventional marriage manuals for use with his parishioners, underprivileged members of minority groups.

The Government's rebuttal witnesses testified, on the other hand, that the Handbook had no value for treatment of persons with psychiatric problems (R. 335-344).

The trial judge found that there was "no credible evidence that the Handbook ha[d] the slightest valid scientific importance for treatment of individuals in clinical psychiatry, psychology, or any field of medicine" (R. 352, 366), thus rejecting the sworn testimony of Reverend von Hilsheimer, Dr. Bennett, and Mrs. Serett that the book could be used to beneficial purpose.[29] Reverend von Hilsheimer's testimony was

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[29] Similar statements attesting to the Handbook's usefulness were received from Dr. Thomas E. Rardin (Exhibits Annexed to Motion to Dismiss Indictment, R. 23); Dr. Wallace C. Ellerbroek (*Id.* R. 29); Dr. Stanford R. Gamm (*Id.* R. 30); Robert A. Harper, Ph.D. (*Id.* R. 35); Dr. Abraham J. Rosenfeld (*Id.* R. 49); Richard P. Walsh, Ph.D. (*Id.* R. 53-54); Dr. Harry Benjamin (*Id.* R. 57); Jesse H. Harvey, Ph.D. (*Id.* R. 66-71); Glenn C. Martin (*Id.* R. 78); Dr. Dean R. Archer (*Id.* R. 84); Phyllis C. and Eberhard W. Kronhausen, Ed.D. (*Id.* R. 87-89); Robert L. Caldwell, D.D. (*Id.* R. 97-98).

rejected because he had allowed "teen-age children" to read the Handbook and was thought to advocate that the book "be in every home and available for teen-agers for guidance in sex behavior" (R. 366).[30] The trial court's interrogation of this witness made it clear that he strongly differed with Reverend von Hilsheimer's views on the need for sex education of young people (R. 296-297, 300-305), but testimony cannot be rejected simply because the trier of fact disagrees with the witness' philosophy. What is more, there was no basis whatever for rejection of Dr. Bennett's expert testimony or Mrs. Serett's statement that many physicians and other professionals purchase and use the book.

On the basis of all the evidence the trial court should have found that the Handbook possessed the claimed utility. At the very least, since the experts disagreed as to whether the book was useful to persons with sexual problems, the trial court should have found that its value "for the treatment of individuals in clinical psychiatry, psychology, or any field of medicine" (R. 352) was debatable. But even that finding would not support the conclusion that the book is "utterly without redeeming social importance".

The existence of legitimate debate over this aspect of claimed value argues for the book's protection, not its suppression. *Kingsley International Pictures* v. *Regents,* 360 U.S. 684, 689 (1959); *Hannegan* v. *Esquire,* 327 U.S. 146, 157-158 (1946). The First Amendment requires that all such debates be resolved in the marketplace of ideas, not by judicial fiat.

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[30] But see actual testimony at R. 296.

Moreover, "clinical utility" was not the Handbook's only claim to importance. Neither the trial court nor the court below gave consideration to the Handbook's social commentary or its informational importance as a true exposition of a woman's sexual attitudes, experiences and emotions. These elements preclude a finding that the Handbook is "utterly without social importance" and support the book's claim to constitutional protection.

(2) Pruriency

The Handbook's style is not salacious or suggestive. It is as forthright as an anatomical chart. Unlike works which are designed to have prurient interest appeal (see, *e.g.,* Exs. D5, D6, D7 and D8), the Handbook is not made up of a succession of increasingly erotic scenes without distracting non-erotic passages. It describes and deals with the realities of the author's life (R. 200, 227, 290), and is replete with such non-erotic elements as money worries (Ex. G17, 63, 111-112, 130, 183-184, 188), arguments with her spouse (*Id.,* 61-62, 64, 187-188), childbirth (*Id.,* 57-58, 97-98, 160-162), fear of pregnancy (*Id.,* 47-49), menstruation (*Id.,* 28, 170), divorce (*Id.,* 142, 145, 206), abortion (*Id.,* 63-65, 156-157), fear of venereal disease (*Id.,* 71-74) and illness of children (*Id.,* 101, 203-204).

There was no testimony whatever that the Handbook would appeal to the prurient interest of the average adult reader. All the testimony was to the contrary. Dr. McCormick testified that the predominant effect of the Handbook was not to create in the average person a morbid or shameful desire or longing with respect to sex (R. 206) and that the writing was not morbid and would not "tend to corrode and to turn [a] person

against himself in the process of reading" it (R. 210). Dr. Bennett testified that the book would not appeal to the prurient interest of an average mature person (R. 264).

(3) Patent Offensiveness

Dwight Macdonald testified that the Handbook does not go "substantially beyond the customary limit of candor that society * * * permits in its literature at the present time" and that its sexual descriptions were less explicit than those in "Lady Chatterly's Lover" (R. 235-236). "Lady Chatterley's Lover" contains "a number of passages describing sexual intercourse in great detail with complete candor and realism. Four-letter Anglo-Saxon words are used with some frequency." *Grove Press* v. *Christenberry,* 175 F. Supp. 488, 500 (SDNY 1959), aff'd 276 F. 2d 433 (2 Cir. 1960). Mrs. Serett does not use "gutter words". Although the book is an autobiography, in first person form, it may be compared with third-person treatises on sexual techniques, and these treatises, customarily described as sex or marriage manuals, contain more graphic and detailed descriptions of sexual acts and practices than are found in the Handbook.[31]

The uncontradicted testimony and comparison of the Handbook with novels and marriage manuals in current circulation establishes that the Handbook does not go substantially beyond customary limits of candor in its description of sexual matters.

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[31] See, *e.g.*, "Married Love" by Dr. Marie C. Stopes; "Psychology of Sex" by Havelock Ellis; "Ideal Marriage" by Theodore H. Van de Velde; "The Sexually Responsive Woman" by Drs. Phyllis and Eberhard Kronhausen; and "Love Without Fear" by Dr. Eustace Chesser.

(4) Summary

The Housewife's Handbook has redeeming social importance, does not predominantly appeal to prurient interest, and does not go substantially beyond the limits of candor that society now tolerates in literature dealing with sexual matters. It is not "hard-core pornography" and is not "obscene" when measured by the standards enunciated by this Court.

D. Liaison

(1) Redeeming Social Importance

Liaison was published as a biweekly periodical. There were many issues published, but only the first, the subject of indictment and conviction in this case, was attacked as "obscene". This issue, except for the long article entitled "Slaying the Sex Dragon", was written by Jack Darr (R. 179-181), a government witness, who testified that his "employment was terminated" soon thereafter (R. 183).

"Slaying the Sex Dragon" is a report of an "at home" interview with Dr. Albert Ellis on the occasion of publication of his book *Reason and Emotion in Psychotherapy.* The report quotes Dr. Ellis in his espousal of freedom of sexual conduct. These views are highly controversial and most members of our society would find them unacceptable, but Dr. Ellis is a highly credentialed psychologist[32] whose views on sex must be considered seriously. Dr. Ellis makes his argument forcefully by language and examples charged with shock value and calculated to compel the reader to react, think, and perhaps accept.[33] The trial judge

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[32] See p. 47, ftn. 26, *supra.*

[33] Cf. "Lady Chatterley's Lover" by D. H. Lawrence.

said that Liaison "advocated [the idea] of complete abandon of any restraint with regard to any form of sexual expression". This is an accurate characterization of Dr. Ellis' position, but advocacy of this idea is as much entitled to protection as advocacy of "socialism or the single tax". *Kingsley International Pictures Corp.* v. *Regents,* 360 U.S. 684, 689 (1959).

(2) Patent Offensiveness

Dwight Macdonald testified that Liaison, Vol. 1, No. 1, was tasteless, vulgar, and repulsive, but that based upon his observation of the literary scene, it does not go substantially beyond the limits of candor which society now tolerates in descriptions or discussions of sexual matters (R. 236-237). Cf. *United States* v. *Keller,* 259 F. 2d 54, 58 (3 Cir. 1958): "Some of the words complained of * * * are vulgar and perhaps repugnant to one of average sensibilities, but a conviction under Section 1463 cannot be sustained on such grounds."

(3) Pruriency

The Government offered no testimony to prove that Liaison had prurient interest appeal to the average person, and the trial court failed to find that it had such appeal.[34]

Drs. McCormick and Bennett both testified that there was nothing in Liaison which could be erotically stimulating to a normal, average person, and only a class of psychotics, technically termed "paraphilliacs",

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[34] The court found only that Liaison was "published for the *purpose* of appealing to the prurient interest of the average individual" (R. 352). See Point IV pp. 57-58, *infra.*

could be stimulated by this material (R. 215, 265-266).

Since nothing in Liaison has the "tendency to excite lustful thoughts", *Roth* v. *United States,* 354 U.S. 476, 487, ftn. 20 (1957), or make the average person "uneasy with desire or longing", *United States* v. *Keller,* 259 F. 2d 54, 58 (3 Cir. 1958), it could not be held obscene even if it were patently offensive and totally devoid of socially redemptive value.

(4) Summary

Liaison has redeeming social importance, does not predominantly appeal to prurient interest, and does not go substantially beyond the limits of candor that society now tolerates in literature dealing with sexual matters. It is not "hard-core pornography" and is not "obscene" when measured by the standards enunciated by this Court.

E. The Advertising Counts

The Government stipulated that the advertising materials were "not in and of [themselves] alleged to be obscene under 18 U.S.C. § 1461," but that "it [was] the Government's theory of the case that [they] advertised where and how allegedly non-mailable material could be obtained" (R. 148-149).

Since, as we have shown, the convictions on the Handbook counts (11 through 16), the Eros counts (17 through 22) and the Liaison counts (23 through 28) must be reversed, the convictions on the advertising counts must be reversed as well.

IV.

THE TRIAL JUDGE'S FINDINGS DO NOT SUPPORT THE CONVICTIONS ON THE EROS AND LIAISON COUNTS

Even if this Court were to conclude, on independent examination, that Eros and Liaison are "obscene", reversal on those counts would nonetheless be required for lack of essential findings.[35]

Petitioners made a timely request for special findings under Rule 23(c) of the Federal Rules of Criminal Procedure. The court purported to make such findings,[36] and "[u]nder this Rule * * * the verdict would be supported or fail of support on the basis of the facts found rather than on the basis of facts which might reasonably be found * * *." *Proceedings of the Institute on Federal Rules of Criminal Procedure,* 5 F.R.D. 184, 199-200 (1945). See also *Wilson* v. *United States,* 250 F. 2d 312, 324-325 (9 Cir. 1957).

On the Eros counts the trial court failed to find "patent offensiveness",[37] and on the Liaison counts, he failed to find "prurient interest appeal",[38] and since *Manual Enterprises* v. *Day,* 370 U.S. 478, 486 (1962),

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[35] *Supra,* pp. 44-45, 55.

[36] But see point V.c, *infra,* pp. 61-66.

[37] The court below inexplicably inferred the existence of such a finding from Special Findings of Fact Nos. 16, 17, 18, and 19 (R. 353), none of which deal with the concept known as "patent offensiveness" (R. 391). By way of contrast, the trial judge specifically found that both Liaison and the Handbook went "substantially beyond customary limits of candor exceeding contemporary community standards in description and representation of the matters described therein" and were "patently offensive on [their] face" (R. 352, 353; Special Findings 5, 7, 11, 14).

there can be no doubt that for material to be obscene it must be *both* patently offensive *and* appeal to prurient interest.

The absence of an essential finding is deemed a finding against the party having the burden of proof. Cf. *Woods* v. *Turner,* 172 F. 2d 313, 315 (10 Cir. 1949); *Schioler* v. *Secretary of State,* 175 F. 2d 402, 403 (7 Cir. 1949); *Switzer Bros.* v. *Locklin,* 297 F. 2d 39, 45 (7 Cir. 1961). Accordingly, the failure to make findings essential to guilt required acquittal on the Eros and Liaison counts.

V.

ERRORS IN THE TRIAL COURT REQUIRE A NEW TRIAL IN ANY EVENT

A. The Trial Court Erroneously Used Evidence Against One Defendant to Support the Conviction of All

Over objection, the trial judge allowed the Government to introduce testimony and exhibits establishing that Frank Brady, Associate Publisher of Eros Magazine, Inc., wrote to the Postmasters of Blue Ball and Intercourse, Pennsylvania, seeking use of these post offices for Eros' direct mail (R. 153-158, Exs. G 1-2). Although there was no evidence that petitioner Ginzburg knew of or directed Brady's inquiry, or that it was made on behalf of petitioners Documentary

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[38] The court below held that Special Findings Nos. 11, 12, 13, 14, 15 (R. 352-353) supported conviction on the Liaison counts (R. 391). But the trial court found only that Liaison was "published for the purpose of appealing to the prurient interest of the average individual" (R. 352, Special Finding 12), not that it had such appeal in fact. Compare Special Finding No. 6 on the Handbook and No. 16 on Eros (R. 352-353).

Books, Inc. or Liaison News Letter, Inc., the trial judge, erroneously applying conspiracy doctrine,[39] found that *all* the petitioners sought to mail from the Blue Ball and Intercourse post offices "in order that the postmarks on mailed material would further [their] general scheme and purpose" (R. 351, Special Findings Nos. 3 and 4).

The Government offered this testimony and the trial court received it as "clearly go[ing] to intent, as to what the purpose of publishing these magazines was" (R. 155). Indeed, the only evidence the Government offered in its case in chief (other than the material mailed) related to this issue. A reading of the trial judge's findings (R. 351) shows that the Blue Ball and Intercourse testimony was relied upon as relevant, and highly prejudicial, evidence of a specific intent to appeal to prurient interest for a profit. The opinion of the court of appeals demonstrates that that court was also greatly influenced by this evidence (R. 385-386). Nevertheless, the court of appeals held that petitioners were not prejudiced by the erroneous transfers of intent since they had stipulated that they knew the content of the publication each was charged with mailing, and this was the only "intent" the statute required. Thus, the court allowed the prosecution to offer evidence whose capacity to prejudice and inflame is self-evident and then on appeal to insist that such evidence was not relevant in the first place. This Court's holding in *Bram* v. *United States,* 168 U.S. 532, 541, (1897) clearly prohibits such a practice:

> "the prosecution cannot, on the one hand, offer evidence to prove guilt, and which by the very

[39] The indictment did not charge conspiracy and no conspiracy was established.

> offer is vouched for as tending to that end, and on the other hand, for the purpose of avoiding the consequence of the error caused by its wrongful admission, be heard to assert that the matter offered * * * was not prejudicial, because it did not tend to prove guilt."

The Blue Ball and Intercourse testimony, not being relevant to the issues in the case, should have been excluded. But once admitted at the Government's insistence and relied on by the trial court to support the convictions of all petitioners, the convictions could not have been sustained on appeal on the premise that petitioners could have been found guilty on some other theory, *Wilson* v. *United States,* 250 F. 2d 312, 325 (9 Cir. 1957). This is a violation of due process. *Russell* v. *United States,* 369 U.S. 749, 766 (1962); *Cole* v. *Arkansas,* 333 U.S. 196 (1948). For this reason alone the convictions of Ginzburg, Liaison and Documentary Books must be reversed.

B. The Trial Court Admitted and Relied Upon Evidence of the Handbook's Effect on Adolescents

The trial court permitted Dr. Nicholas Frignito, a Government rebuttal witness, to testify that to "the adolescent boy and girl [reading the Handbook] is certainly a very dangerous thing" (R. 321); "for an adolescent boy * * * what this type of book results in causes delinquency" (R. 322); "[t]o an average boy, I would say it would be very disturbing and certainly would possibly, and most likely excite him to sexual misconduct." When asked: "What kind of sexual misconduct?", he replied: "it would lead to self-abuse, masturbation and that would lead to other types of sexual activity" (R. 323-324).

The trial judge overruled petitioners' repeated objections to this testimony (R. 321, 322, 323, 324) and demonstrated that he considered the book's effect on adolescents to be a relevant determinant of obscenity (R. 366, 368). The Handbook's possible effect on adolescents was the principal subject matter of the trial judge's interrogation of defense witness Dr. Bennett and Reverend von Hilsheimer (R. 271-273, 296-298, 300-307); his opinion characterized the Handbook as a guide to teen-age "misbehavior" (R. 366); and his concept of the relevant community to be protected against obscenity included "children of all ages" (R. 367). Despite the trial court's reliance on the Handbook's purported effect on adolescents, the court of appeals found "no error" in the admission of the Frignito testimony.

In *Volanski* v. *United States,* 246 F. 2d 842 (6 Cir. 1957), another obscenity case tried to the district court without a jury, a psychiatrist was permitted "to state his expert opinion that the pictures would have an undesirable effect upon juveniles. That the court's decision was based in large part on this evidence [was] revealed by the trial judge's oral opinion" (*Id.* at 843). In reversing Volanski's conviction, Judge (now Mr. Justice) Stewart said: "The admission of this evidence was prejudicial error" (*Id.* at 844). The same considerations which led to reversal in *Volanski* require reversal of convictions on the Handbook counts.

C. The Trial Judge Denied Petitioners the Procedural Rights Guaranteed by Rule 23(c), Federal Rules of Criminal Procedure

At the close of trial, and before verdict, petitioners' counsel requested the trial judge to find the facts specially as provided by Rule 23(c) of the Federal Rules

of Criminal Procedure (R. 348). The prosecutor asked for "an opportunity to explore this", and although Rule 23(c) gives a court no discretion to deny the request,[40] the trial judge announced "[t]he ruling will be reserved" (R. 348). Later in the day, during the course of summation, the prosecutor announced that "the Government has no objection to specific findings of fact as requested by the defendants" (R. 348), but the court still reserved ruling on petitioners' request saying: "I will determine that before tomorrow morning; maybe late today, and I will let you all know" (R. 349). The following day, upon the convening of court, the judge announced:

> "In the matter of the United States of America versus Ralph Ginzburg, Documentary Books, Inc., Eros Magazine, Inc., Liaison News Letter, Inc., I find the defendants guilty on all counts.
>
> "There was a request by counsel for the defendants in regard to special findings of fact, and I will find the facts especially as requested by defendants' counsel. At the earliest possible time they will be found.
>
> "Meanwhile, I would like to request the Government through Mr. Creamer to submit to me proposed findings." (R. 349)

Petitioners thereupon filed a motion in arrest of judgment or, in the alternative, for a new trial on the ground, *inter alia,* that the trial court failed to make findings as required by Rule 23(c) (R. 350). After this motion was filed, the Government submitted proposed findings *ex parte.* Petitioners do not know precisely when the proposed findings were given to the

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[40] *United States* v. *Morris,* 263 F. 2d 594 (7 Cir. 1959).

trial judge. A copy was not served on petitioners' counsel nor was the original ever filed in the docket. Fifty-four days after adjudging petitioners "guilty on all counts" the court handed down "Special Findings of Fact" purportedly made "pursuant to Rule 23(c)" (R. 351).

The Government then filed its long-delayed answer to petitioners' motion for arrest of judgment or a new trial and subsequently the court denied the motion. Explaining why he had found petitioners guilty before making special findings and why he had asked the prosecutor to provide the findings to support the convictions, the court said:

> "[T]his was not an ordinary criminal case where fundamental operative facts had to be determined. Most of the facts are not clear and precise but instead are mixed with questions of law. * * * It is necessary in such a case for the Court to carefully consider all the legal ramifications of the factual setting, which is really largely agreed upon. Such careful consideration requires detailed legal research and assistance of counsel. Consequently, the Trial Court requested proposed findings and such other assistance as counsel could offer." (R. 360)

This statement standing alone is sufficient to require reversal. The court's verdict rendered in advance of (1) ascertainment "of the facts [which were] not clear and precise", (2) careful "consideration of all the legal ramifications of the factual setting", and (3) "detailed legal research", was no less a prejudgment than if the court had pronounced petitioners guilty in advance of trial.

The trial judge claimed that petitioners waived their right to have special findings issued before or contem-

poraneously with the general verdict by standing silent in the face of a preannounced delay and by not raising a timely objection after the verdict of guilt was announced. But the record shows beyond contradiction that the trial judge, apparently believing that he had discretion to grant or deny the request for special findings, announced that he would rule thereon "before tomorrow morning; maybe late today". When court reconvened, the trial judge pronounced petitioners guilty as the first order of business and then announced that he would grant the request for special findings (R. 349). Petitioners made timely objection to the court's failure to make special findings at or before the general finding of guilt in the only manner provided, by filing a motion for a new trial, which was and is the only relief to cure this error.

"Rule 23(c) contemplates a single set of special findings entered at the time of the entry of the general findings." *Benchwick* v. *United States,* 297 F. 2d 330, 335 (9 Cir. 1961). Special findings under Rule 23(c) serve much the same function in a non-jury case as instructions do in a jury case. *United States* v. *Palermo,* 259 F. 2d 872, 882 (3 Cir. 1958). Just as a jury must apply the proper legal standards in arriving at its verdict, so must a trial judge apply the proper legal standards in arriving at his verdict. *Wilson* v. *United States,* 250 F. 2d 312, 324 (9 Cir. 1957). And just as a trial judge cannot instruct the jury after it returns its verdict, so a trial judge cannot instruct himself after he returns his verdict. How much greater is the error when the post verdict instruction is given *ex parte* by the prosecution! Findings made in such a manner deprived petitioners of all the safeguards Rule 23(c) was designed to afford.

In *Roberts* v. *Ross*, 344 F. 2d 747 (3 Cir. 1965), a civil case decided after affirmance of the criminal convictions here, the court below gave comprehensive consideration to the requirements of fact finding. The court said:

> "[W]e have observed in this case and in a number of others which have been brought here from the district court for review that the judge of the court has followed the practice of announcing his decision for the plaintiff or the defendant substantially in the form of a general verdict, either in a written order or by communication to counsel, and of thereupon directing counsel for the prevailing party to prepare and submit findings of fact, conclusions of law and a form of judgment. The trial judge's order has not been accompanied by an opinion setting out, even summarily, the facts and legal conclusions which have brought him to his decision.
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> * * *
>
> We strongly disapprove this practice. For it not only imposes a well-nigh impossible task upon counsel but also flies in the face of the spirit and purpose, if not the letter, of Rule 52(a).[41] The purpose of that rule is to require the trial judge to formulate and articulate his findings of fact and conclusions of law in the course of his consideration and determination of the case and as a

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[41] The pertinent portion of Rule 52(a), Federal Rules of Civil Procedure provides:

> "In all action tried upon the facts without a jury * * * the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment."

Rule 23(c), Federal Rules of Criminal Procedure provides:

> "In a case tried without a jury the court shall make a general finding and shall in addition on request find the facts specially."

> part of his decision making process, so that he himself may be satisfied that he has dealt fully and properly with all the issues in the case before he decides it and so that the parties involved and this court on appeal may be fully informed as to the basis of his decision when it is made. Findings and conclusions prepared ex post facto by counsel, even though signed by the judge, do not serve adequately the function contemplated by the rule." (*Id.* at 751-752.)

The court reversed the civil judgment.[42] Should fact finding requirements be less stringent in a criminal case, especially one involving "regulation of obscenity" which must "embody the most rigorous procedural safeguards"? *Bantam Books, Inc.* v. *Sullivan,* 372 U.S. 58, 66 (1963); *Smith* v. *California,* 361 U.S. 147 (1959). When a trial judge convicts, delegates to the prosecutor the responsibility to prepare findings to support the conviction, receives these findings *ex parte* and off-the-record, and purports to make findings fifty-four days after he has adjudged petitioners to be guilty, can judgments of conviction—including a sentence of five years imprisonment—be sustained?

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[42] See also *Kinnear-Weed Corp.* v. *Humble Oil & Refining Co.,* 259 F. 2d 398 (5 Cir. 1958); *Mesle* v. *Kea Steamship Corporation,* 260 F. 2d 747, 750 (3 Cir. 1958); and Judge J. Skelly Wright, *The Non-Jury Trial-Preparing Findings of Fact and Conclusions of Law, Seminars for Newly Appointed United States District Judges,* West Pub. Co., 1963, p. 166.

CONCLUSION

For all the foregoing reasons, the convictions must be reversed.

Respectfully submitted,

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APPENDIX

Constitutional Provisions Involved:

First Amendment: Congress shall make no law * * * abridging the freedom of speech, or of the press * * *.

Fifth Amendment: No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, * * * nor be deprived of life, liberty, or property, without due process of law * * *.

Sixth Amendment: In all criminal prosecutions, the accused shall * * * be informed of the nature and cause of the accusation * * *.

Statute Involved:

§ 1461. Mailing obscene or crime-inciting matter:

Every obscene, lewd, lascivious, indecent, filthy or vile article, matter, thing, device, or substance; and—

* * *

Every written or printed card, letter, circular, book, pamphlet, advertisement, or notice of any kind giving information, directly or indirectly, where, or how, or from whom, or by what means any of such mentioned matters, articles, or things may be obtained or made, * * * whether sealed or unsealed; and

* * *

Is declared to be nonmailable matter and shall not be conveyed in the mails or delivered from any post office or by any letter carrier.

Whoever knowingly uses the mails for the mailing, carriage in the mails, or delivery of anything declared by this section to be nonmailable, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, or knowingly takes any such thing from the mails for the purpose of circulating or

disposing thereof, or of aiding in the circulation or disposition thereof, shall be fined not more than $5,000 or imprisoned not more than five years, or both, for the first such offense, and shall be fined not more than $10,000 or imprisoned not more than ten years, or both, for each such offense thereafter.

The term "indecent", as used in this section includes matter of a character tending to incite arson, murder, or assassination.

Rule Involved:

Federal Rules of Criminal Procedure. Rule 23. Trial by Jury or by the Court:

* * *

(c). Trial Without a Jury. In a case tried without a jury the court shall make a general finding and shall in addition on request find the facts specially.